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The Journal of the American Medical Association reports a discussion on expert medical testimony in criminal trials which was had at the annual meeting of the society at Atlanta. The tone of the debate is a cheering sign that the popular contempt, more or less felt also by attorneys, for hired expert testimony, has penetrated the profession which is the most common offender. All the physicians agreed that discredit had been brought upon their calling and that the time had come when the leaders of the profession must take action in self-defense. It was agreed that the root of the evil lay in the fact that expert witnesses are practically employees of one side or another, and that they come into court so biased, as Lord Campbell said, that hardly any weight can be given to their evidence. Human nature is too strong to resist the temptation of a fat fee, especially when the testimony required is in a case where an error is sure to fall upon the side of mercy. In the discussion a few cases were cited in which the State by a preponderance of money had practically monopolized all the expert testimony of the first class. We are bound to say that these cases are not numerous, but that in a majority of trials the defendant is the beneficiary.

But whether expert testimony errs on one side or the other, whether it tightens the halter upon the neck of an irresponsible lunatic or sets free a cold-blooded murderer, it equally outrages justice. What must be the remedy? A suggestion was made by an eminent alienist that the bill offered by certain medical societies of Chicago which passed the Illinois House of Representatives but which was not acted upon by the senate, furnished an escape from the scandals which attach to almost every criminal trial in which insanity is pleaded. This bill provided that the judges of the circuit and superior courts appoint every year "persons who shall act as expert witnesses in the medical and other sciences in giving opinion upon the evidence as presented, in a hypothetical form, in criminal causes that may be on hearing in the courts presided over by said judges." These witnesses shall be "entered as expert witnesses," and when expert opinion is required the trial judge may select three of them to give testimony. They shall be subject to cross-examination, "but such cross-examination shall be limited entirely to the subjects embraced in their opinion." This last clause was inserted for the purpose of protecting such witnesses from the lawyer whose sole purpose is to confuse them and turn the minds of the jury against their accuracy. As we understand it, this does not debar the defense from summoning expert witnesses on their own account. But it is a fair assumption that the jury will place its confidence in the official experts rather than the hired medical attorneys.

NOTES OF RECENT DECISIONS.

BANKS—SAVINGS BANK DEPOSITS—LOST OR STOLEN PASS-BOOKS.—Nearly all savings banks whether savings banks in the technical sense of the term, or whether they are merely departments of a general banking business, have enacted by-laws which provide that the presentation of the pass-book issued to the depositor shall be a sufficient warrant for any payment entered therein, even though the pass-book may have been stolen or lost.

In a late Michigan case, Ackenhausen v. People's Sav. Bank, 68 N. W. Rep. 118, the court was called upon to construe the effect of the following by-law: "While the officers of this institution will do their utmost to prevent fraud, yet, as they will be unable to identify every depositor, this institution will not be responsible for loss sustained, when a book has been mislaid, stolen or lost, if, before the cashier is notified thereof, such book be paid in whole or in part on being presented." The depositor in this case made a deposit with the bank, and was presented with the customary pass-book, but his attention was in no way called to the by-laws which were printed in the book. The book was subsequently presented to the bank by a stranger, who forged the depositor's name and drew the entire deposit from the bank. The bank was one organized under the general banking laws, and was not a savings bank in the sense of being a "mutual" institution.

The court arrived at the conclusion that a by-law to affect a depositor must be brought to his attention; that the *status* established between the bank and the depositor by the act of making a deposit was that of debtor and creditor, and that relation could not be changed except by notice brought home to the depositor and assented to by him. The court cited with approval the language in Smith v. Bank, 101 N. Y. 60, 4 N. E. Rep. 123: "Where a savings bank seeks to justify the payment by it of a depositor's money to a stranger upon the ground that such payments were made to a person having possession of the depositor's pass-book, such pass-book is not negotiable paper, and its possession constitutes in itself no evidence of a right to draw money thereon. It merely imports a liability of the bank to the depositor for the moneys deposited, and an agreement to pay them at such a time and in such a manner as he shall direct. This contract is implied from the nature and objects of the transaction between the parties. The depositor may by special contract authorize payments to be made in some other manner than by his direction; but, in order to make such payments a protection to the bank, it is necessary for it to show some special agreement with the customer, authorizing such a mode of payment."

WATERS — SURFACE AND SUBTERRANEAN STREAMS—RIPARIAN OWNERS—INTERFERENCE WITH PERCOLATION.—The case of Tampa Water-works Co. v. Cline, 20 South. Rep. 780, decided by the Supreme Court of Florida, is valuable as an exposition of the law governing surface and subterranean streams and the relative rights of owners of land contiguous thereto. The following is a summary of the points decided in the case, the exhaustive opinion of Mabry, C. J., being too long for publication:

1. The proprietor or owner of land bordering on a surface stream of water flowing in a well-defined channel has, in the absence of any modification of relative rights by contract, legislative grant, or prescription, the right to receive the water of the stream from the proprietor above substantially undiminished in quantity and uncorrupted in quality; and this right exists, not from any supposed grant or prescription, but *ex jure naturæ*, and as an incident to the soil, and for the reason that surface streams of flowing water are the gift of Providence, for the benefit of all lands through which they flow, and, as such, their usufruct is appurtenant to such lands.

2. The right to the benefit and advantage of the water in surface streams flowing in well-defined channels past one owner's land is subject to the similar rights of all the proprietors on the banks of the stream to a reasonable use and enjoyment of a natural bounty; and it is only for an unauthorized and unreasonable use that one proprietor can have a just cause of complaint against another.

3. The benefit and advantage of surface water flowing in well-defined channels to an adjoining land proprietor extends certainly to the supplying natural wants, including the use of the water for domestic purposes of home and farm, such as drinking, washing, cooking, or for stock; and a reasonable use of the water for such purposes may be made.

4. The owner of land through which subsurface water, without any distinct, definite, and known channel, percolates or filters through the soil to that of an adjoining owner, is not prohibited from digging into his own soil, and appropriating water found there to any legitimate purposes of his own, though, by so doing, the water may be entirely diverted from the land to which it would otherwise naturally have passed; but, if subterranean water has assumed the proportions of a stream flowing in a well-defined channel, the owner of the land through which it flows will not be authorized to divert it, pollute it, or improperly use it, any more than if the stream ran upon the surface in a well-defined course.

5. The only difference in the application of the law to surface and subsurface streams is in ascertaining the character of the stream. If it does not appear that the waters which come to the surface are supplied by a definite flowing stream, they will be presumed to be formed by the ordinary percolations of water in the soil; such presumption being necessary on account of the difficulty in determining whether the water flows in a channel beneath the soil.

6. A stream or water course consists of bed, banks, and water; and, to maintain the right to a water course, it must be made to appear that the water usually flows in a certain direction, and by regular channel, with banks or sides, and having a substantial existence; but it need not be shown that the water flows continually, as it may be dry at times.

7. The fact that a corporation was chartered for the purpose of supplying a certain city and its inhabitants with water, and is under a contract with the city to supply it and the people therein with water, does not give the corporation any additional right to use or appropriate the water in a well-defined stream flowing over or through lands of different landowners.

CONSTITUTIONAL LAW — RIGHT TO BEAR ARMS—PARADE WITH FIREARMS.—The case of Commonwealth v. Murphy, decided by the Supreme Judicial Court of Massachusetts, presents an interesting question of constitutional law. It was there held that a statute prohibiting parading by unauthorized bodies of men is not repugnant to the constitutional law of Massachusetts. It appeared that defendant with others, forming a company in a parade, carried ordinary breech-loading Springfield rifles, which had been rendered useless by boring holes in the barrels and by filing down the firing pin, so that the rifles

could not be used to discharge any missile by means of gunpowder or other explosive. It was held that the rifles, being to an ordinary observer efficient, were "firearms," within the meaning of Massachusetts Laws, 1893, chapter 367, section 124, forbidding parading by unauthorized bodies of men with firearms. The court said:

The defendant is complained of for belonging to and parading with a certain unauthorized body of men with arms, which said body of men had associated themselves together as a company and organization for drill and parade with firearms, in violation of St. 1893, ch. 367, Sec. 124. He contends that this statute is in contravention of the seventeenth article of the declaration of rights, which declares that "the people have a right to keep and bear arms for the common defense." This view cannot be supported. The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized so to do by law. This is a matter affecting the public security, quiet and good order, and it is within the police powers of the legislature to regulate the bearing of arms, so as to forbid such unauthorized drills and parades. Presser v. State of Illinois, 116 U. S. 252, 264, 265, 6 Sup. Ct. Rep. 580; Dunne v. People, 94 Ill. 120. The protection of a similar constitutional provision has often been sought by persons charged with carrying concealed weapons, and it has been almost universally held that the legislature may regulate and limit the mode of carrying arms. Andrews v. State, 3 Heisk. 165; Aymette v. State, 2 Humph. 134. Wilson v. State, 33 Ark. 557; Haile v. State, 38 Ark. 564; English v. State, 35 Tex. 473; State v. Reid, 1 Ala. 612; State v. Wilforth, 74 Mo. 528; State v. Mitchell, 3 Blackf. 229; Bish. St. Crimes, Sec. 793. The early decision to the contrary, of Bliss v. Com., 2 Litt. Ky. 90, has not been generally approved.

The defendant further contends that this statute, which mentions certain military bodies as exempt from its operation, is class legislation, which grants exclusive privileges to certain classes of citizens which are denied to the body of the people. It is not contended that the troops of the United States or the regularly organized militia of the commonwealth should be forbidden to drill and parade; but the argument is that the legislature has no power to single out other independent organizations, and give to them peculiar rights which it denies to others. But, in regulating drills and public parades, it is for the legislature to determine how far to go. No independent military company has a constitutional right to parade with arms in our cities and towns, and the granting of this privilege to certain enumerated organizations does not carry with it the same privilege to all others. It is within the power of the legislature to determine, in reference to such independent organizations which of them may, and which of them may not, associate together and organize for drill and parade with firearms. No decision has been cited to us which intimates the contrary. The granting to certain persons of special privileges of this kind, which do not interfere with the rights of others, is not open to objection on constitutional grounds.

It appeared in evidence that the defendant, with ten or twelve other men, formed one company in the parade, and that all the men in this company carried ordinary breech-loading Springfield rifles, which had been altered and bored in the barrel near the breech, and the firing pins had also been filed down, so as to make them immovable; and in this condition they could not discharge a missile by means of gunpowder or any other explosive. The defendant contends that these weapons were not "firearms," within the meaning of the statute. The purpose for which these alterations were made is not disclosed. They would not be obvious to the ordinary observer, while the rifles were carried in the parade. So far as appearance went, it was a parade with firearms which were efficient for use. To the public eye, it was a parade in direct violation of the statute. The men who carried these weapons could not actually fire them, but it would be generally supposed that they could. With the exception of the danger of being actually shot down, all the evils which the statute was intended to remedy still existed in the parade in which the defendant took part. To hold that such a weapon is not a "firearm" within the meaning of the statute, would be to give too narrow and strict a construction to its words. It was originally a firearm which was effective for use. The fact that it was disabled for use did not change its name. It was for the court to determine whether the statute included the weapon which was produced and exhibited at the trial, and his instruction to the jury that it was a "firearm" within the meaning of the statute was right. Williams v. State, 61 Ga. 417; Atwood v. State, 53 Ala. 508; Bish. St. Crimes, § 791.

CRIMINAL LAW — FORMER JEOPARDY—WAIVER OF PLEA.—The Supreme Court of California decides, in People v. Bennett, 45 Pac. Rep. 1013, that under Const. Art. 1, § 13, declaring that "no one shall be twice put in jeopardy for the same offense," and Pen. Code, § 687, providing that "no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted" one tried without a plea of former jeopardy cannot for the first time raise the question of former acquittal on motion for new trial, though both trials were in the same court and before the same judge. The court says:

Our constitution provides that "no person shall be twice put in jeopardy for the same offense" (article 1, § 13); and the Penal Code contains the following provision (section 687): "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." May the defendant for the first time raise the question of once in jeopardy upon his motion for a new trial? The practice here followed is certainly a novel one, and, if justified by the law, such declaration, in effect, will be a nullification of all those sections of the Penal Code providing for special pleas; for if a defendant charged with crime may be allowed to take the chances of an adverse verdict after trial upon a plea of not guilty, and, having lost, may then for the first time upon his motion for a new trial set up a previous acquittal or conviction, or once in jeopardy, every defendant will follow that course, and

a procedure which has been practiced since time immemorial, both in this country and in England, will become a thing wholly of the past. Indeed, if defendant's contention be sound, and the court's decision be allowed to stand, this defendant can never have a final judgment rendered against him, even for the minor offense included in the principal charge; for by the order of the court a new trial is granted, and upon such trial the defendant cannot be compelled to interpose his special plea of once in jeopardy. Neither has the court any power to enter such plea for him. Therefore upon another conviction for the same offense he would again secure a new trial upon the same grounds which were previously successful, and the practice could be continued indefinitely. To allow a defendant, as was done in this case, to sit idly by during the progress of his trial, and then, upon conviction, set up, upon motion in arrest of judgment, or for a new trial, a special defense that he could have raised at the very inception of the trial, would be to sanction a practice which might well be termed trifling with the court. If a defendant could raise this question after trial and conviction, he could with equal success raise it after a plea of guilty, no trial having been had. The defendant's plea of not guilty puts in issue all the allegations of the indictment or information, and nothing more. In this case the defendant would not have been allowed to prove at the trial that he had been once in jeopardy, for there was no such issue in the case, and could be none unless he saw fit to make it by plea. To say that evidence could be introduced before the court upon his motion for a new trial that would not have been admitted if offered at the trial would be an anomaly, and is entirely without the law.

The authorities upon the foregoing question appear to be in entire accord. In Com. v. Olds, 5 Litt. (Ky.) 140, the court, speaking as to special pleas, said: "It is well settled that these two pleas must be pleaded in bar, and that they cannot be given in evidence under the general issue." And in People v. Olwell, 28 Cal. 462, this court said: "At common law, upon a second indictment for the same offense the prisoner could not avail himself of a former conviction under the plea of not guilty, but he was required to plead it specially." And again, in People v. Lee Yune Chong, 94 Cal. 386, 29 Pac. Rep. 778, this language is found: "Counsel for appellant argue the question of 'once in jeopardy,' but that question can arise only after an issue has been made by a plea of 'once in jeopardy.'" An eminent author upon criminal law declares: "The law's methods must be pursued by him who seeks the protection of the law. Hence, as to pleas, to be entitled to show a particular matter in defense he must tender the plea which the law has provided, in the law's form and at the law's time." Again the same author says: "The only method for taking advantage of the former conviction or acquittal we have seen is this plea. Thus there cannot be an arrest of judgment." Bish. New Cr. Proc. §§ 744, 813. See, also, Zachary v. State, 7 Baxt. 1; State v. Washington, 28 La. Ann. 129; Pitner v. State, 44 Tex. 578; State v. Barnes, 32 Me. 534; Rickles v. State, 68 Ala. 538. Section 1020 of the Penal Code in substance declares the same principle. We see nothing violative of any constitutional provision in adhering to the foregoing views. While it is true the constitution declares that no man is to be placed twice in jeopardy for the same offense, still, as Mr. Bishop says, "the law's methods must be pursued by him who seeks the protection of the law," and this the defendant has not done. Again, the fact that the first trial was had in the same court and before the same judge, as the second trial, in no way excused the necessity of the plea of once in jeopardy. The whole question of once in jeopardy was entirely foreign to the case, unless raised by a special plea; and, when so raised, an issue of fact was presented, which the jury alone possessed the power to pass upon.

CONSTITUTIONAL LAW—ARREST OF DEBTOR.—It is held by the Court of Appeals of Kansas, in *In re* Roberts, that Gen. Stat. Kan. 1889, pars. 4872, 4873, in so far as they relate to the arrest and imprisonment of a judgment debtor upon the affidavit of the plaintiff, his agent or attorney, alone, are unconstitutional and void, for the reason that they are in violation of article 14, § 1, of the constitution of the United States, which declares that no State shall "deprive any person of life, liberty, or property without due process of law." The court says in part:

So far as the discussion of the proposition involved in this case is concerned, we consider that the subsequent steps are not material. The contention of the petitioner is that he has been deprived of his liberty without due process of law, and, if this be true, it is immaterial whether the petitioner is actually confined in the jail of Bourbon county, or compelled to remain within the prison limits of said county by reason of the bond set forth in the answer of the sheriff. It is admitted that no provision is made by the Code for a hearing with regard to the question of fraud, where the affidavit is filed by the plaintiff after judgment is rendered, and that the only provisions for the discharge of a debtor so arrested are contained in paragraphs 4609, 4610, 4613, Gen. St. 1889. The first of these sections provides, in substance, that any person taken on execution, where the process is issued from a justice of the peace, may obtain his release by setting off to the officer personal property sufficient to satisfy the judgment and costs; the second provides for the giving of a bond by the execution debtor to remain within prison bounds; and the third provides for his release upon his showing to the satisfaction of the justice who issued the execution that he was unable to perform the act therein commanded, or to endure the imprisonment, and such discharge is allowed upon terms that may seem just to the justice of the peace making the order. Section 16 of the bill of rights provides: "No person shall be imprisoned for debt except in cases of fraud." The obvious meaning of this is that there shall be no imprisonment for debt except in case where fraud has been established. Fraud is never presumed. It is something which must be proven, and proven before a court having jurisdiction to pass upon the question. Consequently, before one, in this State, may be imprisoned for fraud, there must have been a judicial finding, upon due process of law. Section 1 of article 14 of the constitution of the United States provides that no State shall "deprive any person of life, liberty, or property, without due process of law." In the famous Dartmouth College Case, 4 Wheat. 518, Daniel Webster enunciated the following definition of what is meant by "due process of law," which is copied approvingly by Judge Cooley in his work on Constitutional Limitations (page 408, § 353): "By the 'law of land

is most clearly intended the general law,—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." Taking this definition as a basis, we are forced to the conclusion that the sections in controversy are contrary to the letter and spirit of our bill of rights and the constitution of the United States. Nowhere is there any provision for a hearing and determination of the question of fraud, where the affidavit of the plaintiff in an action is filed after judgment. No opportunity is given for an appeal from this portion of the judgment. Under this provision a plaintiff might sue upon an ordinary promissory note, to which the defendant admitted he had no defense, and therefore made no appearance. An ordinary judgment might be rendered by the justice of the peace, and upon this ordinary judgment, if plaintiff should file an affidavit under the statute, the arrest and incarceration of the defendant would follow, for fraud, without any hearing ever having been had, or any determination made that fraud had been perpetrated by said defendant. It is argued by counsel for the respondent that if the affidavit is false the maker thereof may be punished for perjury, or the defendant may obtain his release by one of the methods prescribed by statute. Neither of these arguments answers the objection to the statute. The plaintiff making the affidavit might not be guilty of perjury, for in his own mind he might honestly believe the statements contained in his affidavit to be true; and, even if they were willfully false, the law never intended that one man should be imprisoned upon the affidavit of another, without a hearing and determination by a competent court of the truth of the grounds alleged which warrant such imprisonment. And, so far as the provisions of the statute with regard to the release of a defendant are concerned, they in no manner relieve him from the finding of fraud made by the court. In this case the record shows that the petitioner filed a counter affidavit denying the grounds of fraud alleged by the plaintiff, and denying the facts set up as a basis for the allegations of fraud, but he was denied a hearing for the reason that the statute nowhere provided for a hearing after judgment upon this question. In San Mateo v. Southern Pac. R. Co., 13 Fed. Rep. 722, the court uses the following language: "By 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary manner prescribed by law, it must be adapted to the end to be attained, and it must give to the party to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering in it, the proceeding would be anything but due process of law. If it touched life or liberty, it would be wanton punishment, or rather wanton cruelty." We do not consider it necessary to cite a large number of cases, or to continue a discussion of this question. The principle here enunciated is too well recognized at this date to demand it. But we are forced to the conclusion that the paragraphs in question, so far as they permit the arrest of a judgment debtor upon the affidavit of the plaintiff, his agent or attorney, and the incarceration of such debtor in the jail of the county, without an opportunity of having a hearing upon the question of fraud, are contrary to the bill of rights, and to the constitution of the United States. The petitioner will therefore be discharged. All the judges concurring.

OFFICE AND OFFICERS—PAYMENT OF SALARY TO DE FACTO OFFICER.—The case of Fuller v. Roberts County, 68 N. W. Rep. 308, furnishes an interesting application of the principle that a county or municipality which has paid a salary to a *de facto* officer, who performed the duties of the office under color of title, while the right to it was in litigation, cannot be held liable therefor again to another who may thereafter establish his title to the office. The following is the opinion of the court:

The plaintiff, claiming to be the legally elected county judge of the defendant county for the term commencing on the first Monday in January, 1893, brought this action to recover the sum of $750, balance claimed to be due him as such county judge. Judgment was rendered in his favor for $600, and the defendant appeals.

The action was tried by the court without a jury, and its findings of fact are as follows: "First. That a general election was held in said Roberts county on the 8th day of November, 1892, and that at said election the plaintiff, Burt Fuller, was duly elected to the office of county judge of Roberts county for the term commencing January 1, 1893, and thereafter a certificate was duly issued to the plaintiff by the county auditor of said Roberts county, and that on the 3d day of January, 1893, the plaintiff qualified for said office, filing his bond and subscribing the oath of office as provided by law, and immediately thereafter demanded possession of said office, and was during the entire term of said office the *de jure* officer, and ready and willing to perform the duties of said office. Second. That the salary of the county judge of Roberts county was fixed, and was, at and during the term of office for which plaintiff was elected, the sum of six hundred dollars per annum, payable quarterly, and that the salary for the entire term of office for which said plaintiff was elected was twelve hundred dollars. Third. That no part of said salary has been paid by the defendant county to plaintiff, Burt Fuller, except the sum of four hundred and fifty dollars which was paid on the 8th day of January, 1895. Fourth. That prior to the time when said plaintiff qualified to enter upon the duties of his office, an election contest was commenced by J. J. Batterton, the then county judge of Roberts county, contesting the election of the said Burt Fuller, and that on the 18th day of September, 1893, judgment was rendered in the said contest action in favor of the said J. J. Batterton and against the said Burt Fuller, sustaining said contest, and that during the time of said term of office the said J. J. Batterton was incumbent in, and performed the duties of county judge in said office. Fifth. That on the 11th day January, 1894, an order was made by the court setting aside and vacating the judgment in said contest proceedings, and granted to the plaintiff, Burt Fuller, who was defendant in said contest proceedings, a new trial therein. Sixth. That defendant county has paid to said J. J. Batterton, as salary for the office of county judge for said term, the sum of seven hundred and fifty dollars." From these findings the court concludes, as matter of law, that the defendant county was indebted to the plaintiff for the salary for the term, less $450 paid, and $150 paid Batterton for the quarter ending December 31, 1893. This was the quarter following the judgment in favor

of Batterton, and before the new trial was granted, and was evidently allowed to the county upon the theory that, having been paid by it after judgment in Batterton's favor, it was properly paid. We may add that the order granting a new trial, referred to in the fifth finding, was, on appeal to this court, affirmed, The case is reported under the title of Batterton v. Fuller, 60 N. W. Rep. 1071. Prior to the trial the court, on motion of plaintiff's counsel, struck out three paragraphs of the answer, to which the defendant excepted, and it now assigns as error the ruling of the court in so striking them out. But, in the view we take of the case, it will not be necessary to discuss this, and many other assignments of error in the record, and we shall confine ourselves to the consideration of the following assignments: "The court erred in finding, as a matter of law, that the defendant county is indebted to plaintiff, Burt Fuller, on account of the salary of county judge, for the term of office commencing on the 1st day of January, 1893, and ending on March 31, 1894, except the salary of said office for the quarter ending December 31, 1893. (12) The court erred in finding, as a matter of law, that the sum due to plaintiff from defendant on account of said salary is the sum of six hundred dollars with interest from and after the 8th day of January, 1895." It will be observed that the court finds that Batterton discharged the duties of the office of county judge during the entire term, and that the county had paid him therefor the sum of $750, which, with the $450 paid to the plaintiff, made up the salary of the entire term. So far as the record discloses, no judgment was at any time rendered against Batterton during the term, and hence the county, by its board of commissioners, made no payments of salary to him, with knowledge of any judgment in favor of the plaintiff, as did the commissioners in the case of Fylpaa v. Brown Co. (S. D.), 62 N. W. Rep. 962. The only judgment in the case of Batterton v. Fuller, so far as the record discloses, was one in favor of Batterton's title to the office. It is true, that judgment was set aside, and vacated, and a new trial granted, but the granting of the new trial did not determine the respective rights of the parties to the office. It would seem that the weight of authority sustains the position that payment made to a public officer *de facto*, who discharges the duties of an office pending the litigation as to the title, is a bar to the recovery of the money so paid, in an action by the officer *de jure*. The rule is thus stated by Mr. Justice Fuller in Chandler v. Hughes Co. (S. D.), 67 N. W. Rep. 947: "The rule is that payment by a municipality to an officer *de facto*, who has entered upon and performed the duties of an office, under color of title, pending litigation to establish the right of a *de jure* officer, is a bar to a recovery from the public of the amount thus paid before the entry of judgment, and the only remedy available to the officer *de jure* is an action for damages against the officer *de facto*. Mechem, Pub. Off. 871; Commissioners v. Anderson, 20 Kan. 298. Payment by the public to one with color of title, actually in an office, discharging its duties, whose right thereto has not been by a competent judicial tribunal adversely determined, is full protection against any further liability." The decision of the court, therefore, upon the facts found, cannot be sustained, and must be reversed.

It is contended by the respondent that such a rule will encourage parties to hold over offices to which they have in fact no title, in order to draw the salary. There is force in this contention. But it is for the interest of the community that public offices should be filled, and the duties of the office discharged by either an officer *de jure* or an officer *de facto*; and, in order to secure this service, the officer performing it must ordinarily be paid. And the public should not be allowed to suffer by reason of litigation between conflicting claimants to an office; and the payment, in good faith, to the officer discharging the duties of the office, should be held a bar to any other action. Ordinarily, it would be the duty of the circuit court, in a contest case, to put the claimant, who has the certificate of election, and therefore, *prima facie*, the title to the office, in possession by *mandamus* proceedings, without in any manner determining the real title to the office, if the court is satisfied that an election duly authorized by law has been held, or an appointment provided for by law has been made. This was declared to be the law in Driscoll v. Jones, 1 S. D. 8, 44 N. W. Rep. 726, after a full consideration of the subject. In this case, so far as the record discloses, the plaintiff made no application for such a writ, and seems to have allowed Batterton to retain the office during the pending of the contest proceedings. It is to be presumed that, if the application had been made to the court, it would at once have issued its mandate, and placed the plaintiff in possession of the office pending the litigation, upon the production of his certificate of election, and proof that he had duly qualified. This *prima facie* title may be impeached in the proper proceeding, but cannot be on an application for a *mandamus*. In that proceeding no question of the actual title is involved. Who, upon the face of the papers, is entitled to the office? is the only question involved in such a proceeding. The judgment of the circuit court is reversed.

LEGITIMATE COMPETITION.

The boundary of legitimate competition is a discovery of recent years. Former decisions afforded only an outline. It was left for the litigation which has sprung from our modern trusts and trade combinations to definitely fix the dividing line between legitimate competition and illegal commercial piracy. The courts of a majority of the States have not yet passed upon all the propositions involved in this discussion; but recent leading cases[1] have so exhaustively argued the subject, and by cross references so strengthened the authority of each other, that we consider it safe to say the main principles of law involved are authoritatively settled, and to predict that courts in States where the subject has not yet been considered, will, when called upon, decide in accordance with these well settled

[1] Bowen v. Hall, 6 L. R. (Q. B. D.) 333; Carew v. Rutherford, 106 Mass. 1; Haskins v. Royster, 70 N. C. 601; Chipley v. Atkinson, 1 S. R. 934; Van Horn v. Van Horn, 52 N. J. Law, 284; Curran v. Galen, 29 N. Y. S. 826; Temperton v. Russell, 4 Reports (Q. B. A.) 376; Delz v. Winfree, 16 S. W. Rep. 111; Olive v. Van Patten, 25 S. W. Rep. 428; Mogul Steamship Co. v. McGregor, Gow & Co., 23 L. R. (Q. B. D.) 598.

principles. The authorities upon our subject do not entirely agree in all respects; but the differences, as we shall try to show, are less serious than would appear to a casual student, and may all be harmonized into certain basic propositions. In this class of cases the courts have found antagonistic principles of law requiring to be reconciled without impairment of either. It is frequently a part of the necessities of trade that where one man gains another man must lose, and it often happens that one who seeks to build up his own business must necessarily plan to injure or possibly ruin the business of his neighbor. To clearly mark, in the presence of such conditions, the dividing line between a person's right to use his own as he sees fit and the injunction laid upon him to so use his own property and rights as not to injure another in a like use of his property and rights, has called for clear, judicial discernment. In transactions involving competition the interests of the public at large are at stake, and in consequence it some times happens that one may deprive another of his trade and the law pronounces it legitimate competition, while if he should take from the other the money which that trade is worth, the law would stamp his act as stealing. If the law could consider only the rights of two individuals in such cases, without regard for the interest of the public, the judgment would undoubtedly be quite different. Each person derives many and great advantages through his civil relation in society; but, on the other hand, he is at times called upon to suffer disadvantage for the good of society in general, and endure what would be injustice, if it were not necessary for the good of the many. The law recognizes free competition as of the utmost concern to the general welfare of all, and will protect it, even though individuals suffer. As a necessity of free competition the law allows a person to buy or not to buy as he pleases, from whom and where he pleases; to sell or not to sell as he pleases, and to whom and where he pleases;[2] to employ or to discharge from his employment whomsoever he pleases;[3] or himself to work for or refuse to work for whomsoever he pleases.[4] In other words, every one may enter into or refuse to enter into, may continue or refuse to continue business relations with each and every one else.[5] This proposition we presume will upon first thought appear to be both reasonable and just, for we are inclined to include in this proposition the presumption that a person exercises such control of his own business for the sole purpose of advancing his trade interests; but the law, as found in these decisions, takes a radical step further than this, and declares, however unjust it may seem, that a person may buy and sell, or refuse to buy and sell, work for or refuse to work for another, employ or refuse to employ another, as above stated, whatever his motives may be, whether actuated by malice, whim or caprice, and even though he seeks by so doing no benefit to himself, but solely injury to another.[6] This radical position has led some jurists into what we must consider a grave error—that of concluding that the law sanctions an evil motive, or has no regard for the motives with which actions are done.[7] Such a conclusion we believe to be untenable and wholly contradicted by the great weight of authority.[8] We believe the law never regards an act done for the sole purpose of injuring another in the same light that it regards the same act done without intention to injure. We think the more correct view is that the courts in a certain class of cases are estopped from considering the motive. If the courts in a certain class of cases eliminate the motive from consideration, the presence of a bad motive does not carry with it the sanction of the court. That we believe to be true in these cases which we are discussing, involving the right of a person to control his own trade relations. The importance to the public of free competition is such that the courts are precluded from considering the motives that prevail between the individuals.

[2] Delz v. Winfree, 16 S. W. Rep. 111.

[3] Heywood v. Tillson, 75 Me. 225; Payne v. W. & A. R. R. Co., 81 Tenn. 507.

[4] Commonwealth v. Hunt, 4 Metcalfe, 111.

[5] Bowen v. Matheson, 14 Allen, 499; Hunt v. Simonds, 19 Mo. 583; Mogul Steamship Co. v. McGregor, 23 L. R. (Q. B. D.) 598; Cote v. Murphy, 159 Pa. St. 420; Continental Insurance Co. v. Board of Fire Underwriters, 67 Fed. Rep. 310.

[6] Cooley on Torts, p. 278; Delz v. Winfree, 16 S. W. Rep. 111.

[7] Payne v. W. & A. R. R. Co., 81 Tenn. 507; Chambers v. Baldwin, 91 Ky. 121; Bourlier Bros. v. Macauley, 91 Ky. 135; Boyson v. Thorn, 98 Cal. 578.

[8] Walker v. Cronin, 107 Mass. 555; Moores & Co. v. The Bricklayers' Union, No. 1, VII R. & C. L. J., 108; Van Horn v. Van Horn, 52 N. J. Law, 284; Mogul Steamship Co. v. McGregor, 23 L. R. (Q. B. D.) 598; Chesley v. King, 74 Me. 164.

We cannot conceive that it is a part of a man's civil right to do that which can only be prompted by an utter disregard of the rights of others. Weightier considerations may prevent the law from interfering, but that does not establish the act permitted as a positive civil right.

Among the cases which have specifically taken up the relation of the motive to trade rivalry and given it a wrong interpretation, as it seems to us, are two recent Kentucky cases —Chambers v. Baldwin,[9] and Boulier Bros. v. Macauley.[10] The decisions of the court in these cases seem to be in line with the authorities; but the court in deciding the cases, as it seems to us, has unnecessarily dragged into the decision a discussion of the motive actuating the parties, and in so doing has to that extent placed itself at variance with the great weight of authority, and in opposition to well-grounded principles of justice and reason. In Chambers v. Baldwin, the plaintiffs, Chambers and Marshal allege that they made a contract with one Wise to buy from him one-half of his crop of tobacco agreeing to pay therefor a stipulated price. One Baldwin, knowing of the contract, on account of his personal ill-will toward one of the plaintiffs, and with design to injure the plaintiffs by depriving them of profits on their purchase, and to benefit himself by becoming purchaser in their stead, advised and procured Wise, who else would have kept and performed his contract, to break it whereby the plaintiffs were damaged. The court decided that there was no cause of action. This decision was, so far as we can see, correct, for Baldwin was acting strictly within the limits of legitimate competition. It was a part of his rights in trade to buy from whomsoever he pleased. The fact that in buying the tobacco from Wise he caused the latter to break his contract dose not render his acts illegal, as we shall hereafter notice. In the case of Bourlier Bros. v. Macauley, above mentioned, the plaintiffs had contracted with the manager of Mary Anderson to have her perform at their theater upon certain dates. The defendant subsequently contracted with the manager of Mary Anderson to have her perform at his theater upon those same dates, which she did. This, also comes under the head of legitimate competition, for, as we have previously stated, a person may employ whomsoever he pleases, and this is true, although it causes the one employed to break a contract. The court properly decided there was no cause of action. The court said: "It is not the policy of the law to restrict or discourage competition in any business or occupation, whether concerning property or personal service, there being no good reason for making more stringent regulations in respect to the latter, except where some one of the domestic relations exists, than the former; for, if in order to leave the sale and exchange of property free and unrestrained a person may lawfully and without legal inquisition of his motive buy what another offers for sale, and has a right to sell, it is no less just and expedient that in order to have a fair remuneration for labor a person may be allowed to hire the services of another *sui juris* who offers to be hired." That statement we believe to be good law, and was sufficient grounds for deciding that there was no cause of action in that particular case. But, after intimating that it was not the policy of the law to inquire into the motive in such cases, the court proceeded at once to discuss that very thing, and sought in so doing to overthrow the authority of Lumley v. Gye,[11] and the long list of cases that follow that decision, an attempt as clearly gratuitous and unnecessary as it was unavailing. The courts that have unnecessarily dragged in the question of motive in this class of cases have for the most part given us as authority for so doing certain old cases which decided that a man may dig a well on his own land, although he knows it will spoil a spring on adjacent land, and may intentionally erect a high barrier on his own property so as to shut off the light of an adjacent house.[12] In these last mentioned cases the necessity of preserving to the owner of the land the absolute freedom of its use seems to have caused the courts to disregard the motive in much the same manner that they disregard the motive in certain acts of trade competition. It is not so clearly settled, however, that a man

[9] 91 Ky. 121.
[10] 91 Ky. 135.
[11] 2 El. & Bl. 216.
[12] Story v. Odin, 12 Mass. 157; Thurston v. Hancock, 12 Mass. 220; Mahan v. Brown, 13 Wend. 261; Harwood v. Benton, 32 Vt. 724; Phelps v. Nowlen, 72 N. Y. 39; Frazier v. Brown, 12 Ohio St. 294.

may intentionally use his land so as to injure another without having the law inquire into his motive as that he may control his business relations with others as he sees fit, as suggested above.[13] The latitude given by the law in trade competition permits a person to buy an article or commodity which he knows the seller is under obligations to sell to another, and thus knowingly cause the seller to break his contract with some one else;[14] and likewise permits a person to employ another who is under a contract of employment with a third person, and thus willfully cause the one employed to break such contract.[15] The courts in such cases as in the cases above cited, where the motives were disregarded, consider that the freedom of competition and the consequent benefit to society of such free competition requires that they should not allow the question whether or not a contract is broken to enter into their decision. Add now to this willful causing one to break a contract under circumstances which preclude the court from punishing it, an evil motive which the same circumstances prevent the court from considering, and it is apparent that the individual may be made to suffer a great injustice in order that the absolute freedom of competition may be preserved to society, an injustice so pronounced that the courts will undoubtedly ere long find some rule of law that will give adequate protection to the individual, and at the same time protect the freedom of competition. Cases already cited have indicated the latitude of a man's right to control his own trade, property or labor. A few additional cases on this point, however, may be profitable in order to further illustrate the subject. In Hunt v. Simonds,[16] an action was brought by Hunt against the officers of the various insurance companies in the city of St. Louis to recover damages for an alleged conspiracy to ruin him in his business, the insurance companies having refused, according to a conspiracy entered into by them, to take any insurance on his boat, with the intention, as charged by the plaintiff, to injure and destroy his business. The court said: "It is obviously the right of every citizen to deal or refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him except in some cases where by reason of the public character which a party sustained there rests upon him a legal obligation to deal and contract with others."

A person may discharge his employee, if not prevented by some subsisting contract between them, and the law will not hold him liable for any damage occasioned thereby, whatever the reason may be for so doing, or however unworthy his motives. Payne v. W. & A. R. R. Co.,[17] was a case based upon the following notice sent by one of the railway agents to a yard master who had charge of railway employees living in the vicinity of a certain merchant named Payne. "Any emyloyee of this company on Chattanooga pay-roll, who trades with L. Payne from this date, will be discharged. Notify all in your department." The plaintiff claimed this action was taken to injure him, that his customers left on account of this notice, and that he was greatly injured. The court decided there was no cause of action, which decision was in keeping with the authorities, although as in the Kentucky cases previously discussed the court committed the error of trying to prove that a bad motive is in a law a good motive. In a recent California case, the Continental Insurance Co. v. The Board of Fire Underwriters,[18] it was alleged that the association of insurance companies had been formed under a constitution that provided for the regulation of premium rates, prevention of rebates, compensation of agents, and non-intercourse with companies not members of the association. The plaintiff complained that one of the insurance companies which was a member of the defendant association, sent a letter to an agent of the plaintiff, which contained the following: "We are informed that the following company is in your agency, the Continental Insurance Co. Regretting the circumstances that compel us to put you to any trouble, we have to earnestly request you to decide at once whether it is for your better interest to continue to act as our agent exclusively or as agent of companies not represented in the board. We

[13] Wheatley v. Baugh, 25 Pa. 528; Greenleaf v. Francis, 18 Pick. 117.

[14] Ashley v. Dixon, 48 N. Y. 430; Chambers v. Baldwin, 91 Ky. 121.

[15] Boulier Bros. v. Macauley, 91 Ky. 135.

[16] 19 Mo. 583.

[17] 81 Tenn. 507.

[18] 67 Fed. Rep. 310.

inclose addressed envelope for your answer." The court decided that the plaintiff could not maintain an action because defendat refused to retain agents that represented the plaintiff or because the defendant put such an agent to an election, which he would represent, and further, that the companies in defendant association might refuse to write insurance for any customers of the plaintiff because of their business relation to the plaintiff. In Heywood v. Tillson,[19] the plaintiff sought to recover damages from the defendant because the defendant, who was the owner of Hurrican Island, refused to employ or keep in his employ workmen who rented from the plaintiff whereby the plaintiff was greatly injured, there being no others to whom plaintiff could rent except such workmen of defendant. The court held an employer is not liable "if having the tenants or boarders of a landlord in his employ he discharges them from service because they choose to remain such tenants or boarders, having the right by his contract with them to terminate their services." Commonwealth v. Hunt,[20] illustrates a workman's right to control his labor. In this case "the defendants and others formed themselves into a society and agreed not to work for any person who should employ a journeyman or other person not a member of such society, after notice given him to discharge such workman." The court in deciding the case approved the established principle that "every free man, whether skilled laborer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work, with any company or individual at his own option, except so far as he is bound by contract."

Chicago. WILLIAM H. TUTTLE.

[19] 75 Me. 225.
[20] 4 Metcalfe, 111.

REAL ESTATE—OPTION—SEAL.

O'BRIEN V. BOLAND.

Supreme Judicial Court of Massachusetts, September 2, 1896.

An offer to sell real property at a certain price made by a sealed instrument of writing is irrevocable during the time limited in such instrument of writing.

BARKER, J.: The offer was made on Saturday, December 2, 1893, and the withdrawal on the following Monday. Before making the offer the defendant sought and had two or three interviews with the plaintiff for the purpose of selling the property to him. The defendant shortly before had been in a state of mental depression, due to an accident which occurred some years before, and to attacks of dyspepsia. Sometimes he was very much depressed, at other times excited. Sometimes he was in a dazed and absent-minded condition, and at other times very despondent. On the Saturday mentioned the parties came to an understanding, and went to the office of an attorney who had acted in various matters for the plaintiff, and there the written offer was prepared by the attorney, and was signed, sealed, and delivered by the defendant. Before going to the office the parties drank several times together, at the plaintiff's invitation. But the report finds that the defendant was not intoxicated, and that he was mentally responsible for his acts, and understood the contents of the offer, and that no fraud was practiced. The price named in the offer was $26,000—$3,000 less than the value of the property. After making the offer, and before the attempted withdrawal, the defendant received a better offer. When the offer was withdrawn it had not been accepted. Four days afterwards the plaintiff's attorney wrote to the defendant that the plaintiff would purchase in accordance with the offer. The letter made an appointment for closing the transaction for the following Monday, was silent as to the revocation, and assumed that the defendant was bound to convey. The defendant received this letter on December 8, and on the next day retained counsel, who sent him to the office of the plaintiff's attorney for his deed, which had been left there; but, instead of getting the deed, the defendant promised to be ready on the next Monday to pass the papers. The offer was to sell a block of uncompleted tenement houses; to finish them, and to guaranty them free from all lien or incumbrance except a mortgage for $10,000; and, further, to give a good bond, in the penal sum of $20,000, for the performance of the defendant's agreements. The defendant could not furnish such a bond. While the defendant, when he made the offer, understood its contents, and was mentally responsible, and no fraud was practiced upon him, the bargain was a hard one, in the inadequacy of the price, and was beyond his power to carry out. The plaintiff shows no reason why he would not be fully compensated by damages in an action at law. The defendant contends that the inadequacy of the price, and his own depressed mental and physical condition, should induce a court of equity, in the exercise of a sound discretion, to decline to enforce specific performance. But the substance of the report is that the bargain was voluntarily and understandingly made by a sick man, who himself sought the plaintiff, and who attempted to withdraw his offer after having received another which he thought better. The finding that no fraud was practiced negatives the idea that advantage was taken of his infirmities. The inadequacy of price—$3,000 in a sale of prop-

erty worth $29,000—is not gross, the sale being of unfinished dwellings. We cannot say that these matters preclude the plaintiff from equitable relief. Railroad Corp. v. Baccock, 6 Metc. (Mass.) 346; Lee v. Kirby, 104 Mass. 421; Curran v. Water-Power Co., 116 Mass. 90; Thaxter v. Sprague, 159 Mass. 397, 34 N. E. Rep. 541. See Railroad Co. v. Bartlett, 10 Gray, 384; Love v. Sortwell, 124 Mass. 446; Chute v. Quincy, 156 Mass. 189, 30 N. E. Rep. 550.

The defendant contends that, because he could not have compelled the plaintiff to buy before the acceptance of December 8th, there is a want of mutuality, which should defeat the bill. We enforce specifically contracts assented to by both parties, and further acted upon by the plaintiff, even when he has given only a verbal assent, and, but for the offer in his bill, could not be held to perform on his own part. Railroad v. Evans, 6 Gray, 25, 33; Dresel v. Jordan, 104 Mass. 407, 412; Slater v. Smith, 117 Mass. 96; Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. Rep. 544. Whether we should specifically enforce a contract upon which the plaintiff has not acted, except to give a mere assent, which would not enable the defendant to enforce the contract against him, it is not necessary to discuss. See Putnam v. Grace, 161 Mass. 237, 247, 37 N. E. Rep. 166. In the present case, because the offer was under seal, it was an irrevocable covenant, conditional upon acceptance within 10 days, and the written acceptance within that time made it a mutual contract, which the plaintiff can enforce. Mansfield v. Hodgdon *ubi supra*. See also Clark, Cont. p. 47; Lawson, Cont. § 12; Pom. Spe. Perf. § 169. The plaintiff might have assented to the withdrawal, and the offer would have been at an end. Ballou v. Billings, 136 Mass. 307, 309. But he was not bound to assent, and could treat the withdrawal as inoperative. If he elected so to treat it, he should accept the covenant, and await some further breach. Daniels v. Newton, 114 Mass. 530. The withdrawal, if itself a breach, was only one step toward the situation which would enable the plaintiff to ask for specific performance in a court of equity. In this view of the case, it is unnecessary to consider whether there was a waiver of the withdrawal. The result is that the plaintiff may have such specific performance as is now possible. The terms of the decree will be settled in the superior court. So ordered.

NOTE.—An option is defined as simply a contract, by which the owner of property agrees with another person, that he shall have a right to buy the property at a fixed price within a certain time. Ide v. Leiser, 10 Mont. 5. Many such agreements have been made, which left it optional with the intending purchaser whether he should complete the purchase. In such cases questions have arisen as to the enforceability of such agreements and as to the right of the vendor to withdraw his offer. The rule of law is, that a contract is a mere *nudum pactum*, unless it is has a consideration (*Id.*; Litz v. Goosling, 93 Ky. 185), and therefore some courts have held such contracts to be void, when there was no further consideration than the privilege of purchase. Smith v. Reynolds, 8 Fed. Rep. 696; Burnet v. Bisco, 4 John. 235; Graybill v. Brugh, 89 Va. 895; Faulkner v. Hebard, 26 Vt. 452. Other courts have refused to enforce such contracts because there was no mutuality in them, the proposed vendor not being able to enforce them against the proposed purchaser. Litz v. Goosling, 93 Ky. 185; Graybill v. Brugh, 89 Va. 895. The later rule is, that the want of mutuality is not a sufficient reason for a refusal to enforce such contracts (Johnson v. Trippe, 33 Fed. Rep. Rep. 530; Hayes v. O'Brien, 149 Ill. 403), provided there was a fair consideration therefor. Schroeder v. Gemeinder, 10 Nev. 355; Hawralty v. Warren, 18 N. J. Eq. 127. It has been said that the filing of the suit establishes the mutuality, because the complainant thereby puts himself under all the obligations of the contract, and enables the other party to enforce it. Richards v. Green, 23 N. J. Eq. 536; Estes v. Furlong, 59 Ill. 298. Courts of equity, however, exercise their discretion in such matters, and will not enforce such contracts, if such action would produce hardship or injustice to either party, but will leave the litigants to their remedies at law. Willard v. Tayloe, 8 Wall. 557.

When do Option Contracts Become Enforceable?—It is generally considered, that the option, though it may be but a *nudum pactum*, becomes binding as soon as it is accepted. Gordon v. Darnell, 5 Colo. 302; Ide v. Leiser, 10 Mont. 9; Miller v. Douville, 45 La. Ann. 214; Wall v. Minneapolis, etc. R. R. Co., 86 Wis. 48; House v. Jackson, 24 Oreg. 89. Such acceptance may be shown by some act equivalent to an election to purchase. Gordon v. Darnell, *supra*. Such acceptance must be made within the time limited by the contract (Killough v. Lee, 2 Tex. Civ. App. 260; Stembridge v. Stembridge, 87 Ky. 91), and such right of acceptance will expire at that date without any notice or declaration of forfeiture (Cummings v. Town of Lake, 86 Wis. 382); if no time is limited the offer remains open for a reasonable time to be determined by the circumstances of the case. Larmon v. Jordan, 56 Ill. 204; Stone v. Harmon, 31 Minn. 512. The acceptance must be unconditional, and as broad and comprehensive as the proposal itself. Weaver v. Burr, 31 W. Va. 736; Linn v. McLean, 80 Ala. 360. The contract must so definitely describe the property as to show what the purchaser supposed he was contracting for and what the vendor intended to sell, and to satisfy the statute of frauds. House v. Jackson, 24 Oreg. 89; Coleman v. Applegarth, 68 Md. 21.

Withdrawal of Options.—When the option is a mere offer or proposal, it may be withdrawn at any time (Miller v. Douville, 45 La. Ann. 214; Bradford v. Foster, 87 Tenn. 41; Weaver v. Burr, 31 W. Va. 736; Gordon v. Darnell, 5 Colo. 302), even though prior to the time limited in the offer. Larmon v. Jordan, 56 Ill. 204. Such withdrawal must be before it has been accepted, and the other party must be notified of the withdrawal, or must have knowledge prior to his acceptance of the offer of some act of the giver of the option, which in its nature is incompatible with the continuance of the offer. Coleman v. Applegarth, 68 Md. 21; Dickinson v. Dodds, L. R. 2 Ch. Div. 463; Weaver v. Burr, 31 W. Va. 736; House v. Jackson, 24 Oreg. 89. Where a consideration is given for the option, it is irrevocable before the expiration of the time limited for its acceptance. Bradford v. Foster, 87 Tenn. 41; House v. Jackson, *supra*; Ross v. Parks, 93 Ala. 153; Weaver v. Burr, 31 W. Va. 736; Gordon v. Darnell, 5 Colo. 302. When such offer is contained in a lease of the land subject to purchase

through the offer, the lease itself is a sufficient consideration to make the offer binding. House v. Jackson, *supra*; Schroeder v. Gemeinder, 10 Nev. 355; Herman v. Babcock, 103 Ind, 461; Souffrain v. McDonald, 27 Ind. 269. Though the contract for the option may have a consideration, yet if an extension thereof is granted, such extension must be based on a new consideration to be binding. Coleman v. Applegarth, 68 Md. 21; Ide v. Leiser, 10 Mont. 5. Under the rule, that a deed imports a consideration, which the grantor is estopped to deny, it is held, as in the principal case, that when the offer is made in a sealed instrument, such offer cannot be withdrawn within the time limited, even though there is no consideration therefor. Aller v. Aller, 40 N. J. L. 446; Burkholder v. Plank, 69 Pa. 50, 225; Willard v. Tayloe, 8 Wall. 557; Faulkner v. Hebard, 26 Vt. 452; Weaver v. Burr, 31 W. Va. 736; Larmon v. Jordan, 56 Ill. 204. Some courts however do not attach so much sanctity to a seal, and allow evidence to be introduced to show there was no consideration for the offer. Graybill v. Brugh, 89 Va. 895; Gordon v. Darnell, 5 Colo. 302; Smith v. Reynolds, 8 Fed. Rep. 696. Such ruling seems proper since it is now admitted, that evidence is admissible to show that the consideration was not truly stated in a deed.

Rights of Holder of Option.—An option to purchase land may be assigned. House v. Jackson, 24 Oreg. 89; Perkins v. Hadsell, 50 Ill. 216. One, who buys land with knowledge of an option of purchase thereon, takes it subject to the rights of the holder of such option. Ross v. Parks, 93 Ala. 153; Barrett v. McAllister, 33 W. Va. 738; Haughwout v. Murphy, 22 N. J. Eq. 531.

S. S. MERRILL.

JETSAM AND FLOTSAM.

REMOVAL OF TRADE FIXTURES BY TENANT.

The question as to the period within which a tenant is entitled as against his landlord to remove trade or tenant's fixtures, which has from the earliest times given rise to considerable difficulty, has recently been discussed by Charles, J., in the case of Barff and other v. Probyn, 11 Times L. R. 467. There the tenant of a public house, after his term had expired, remained in possession of the premises, although possession was demanded by the landlord; and while in possession, though after a writ in ejectment had been served upon him, but before judgment for possession had been obtained against him in that action he removed the fixtures and then he gave up possession. The question was whether, under these circumstances, he had a right, as against the landlord, to remove the fixtures, which were admitted to be fixtures which he could have removed during the term; or, in other words, whether the fixtures had not become the property of the landlord. Charles, J., after the discussion of many authorities before him, held that the fixtures had become the property of the landlord, and that the tenant had no right to remove them, and in an action for the wrongful removal and conversion of the fixtures, the learned judge held that the landlord was entitled to damages.

There can be no doubt, on a careful examination of the many authorities on the subject, that the question is a difficult one, and the authorities are by no means uniform as to the exact period of time within which the tenant can remove his fixtures, and after which he is no longer entitled to remove them. One of the earliest authorities we have on the subject is Pool's Case, 1 Salk. 368, in the time of Chief Justice Holt, and the chief justice, after pointing out that there was a difference between trade fixtures, that is, fixtures placed there by the tenant for the purpose of carrying on his trade, and other fixtures, there held that, with regard to trade fixtures the tenant might, by the common law in favor of trade and to encourage industry, remove such fixtures during the term, but that after the term they became a gift in law to him in reversion and are not removable, and that with regard to fixtures other than trade fixtures, he held that they were irremovable after the term.

The law seems to have remained so down to the case of Penton v. Robart, 2 East, 88, where Lord Kenyon, C. J., and the court decided that where the tenancy was put an end to by a proper notice to quit, and where in fact the landlord had obtained judgment in ejectment against the tenant, the tenant, being still in possession, had a right to remove his fixtures; which may be taken to have been trade fixtures. It is impossible to reconcile this judgment of the principle upon which it proceeds with the state of the law as previously existing, and, as we might expect, this case of Penton v. Robarth has been subjected to severe criticism in many later cases, and it may fairly be doubted whether it can be considered to be law at the present time.

It is sufficient here to examine a few of the more important cases which have been decided since Penton v. Robart. In Lyde v. Russell, 1 B. & Ad. 304, decided in 1830, Lord Tenderton, in delivering the considered judgment of the King's Bench, was of opinion that upon the earlier authorities the property in fixtures, which would be in the tenant if he removed them during the term, vested in the landlord on the determination of the term, and he so held in that case. In Weeton v. Woodcock, 7 M. & W. 14, decided in 1840, the considered judgment of the court was delivered by Baron Alderson, and that distinguished judge in his judgment stated the law to be that "the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant," and he quotes with approval the statement made by Parke, B., Minchell v. Lloyd, 2 M. & W. at p. 460, that "here there is no doubt that the steam engines" (the fixtures in question), "were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants, and I am of opinion that trover is not maintainable for them."

The question was again considered in the case of Leader v. Homewood, 5 C. B. (N. S.) 546, decided in 1858, where Willes, J., in delivering the considered judgment of the court, says that the law on the point is by no means clearly settled as to the limits of time within which a tenant is allowed to sever from the freehold fixtures which are usually called "tenant's fixtures." It was unnecessary in that case to consider the question, as the landlord had in fact re-entered and thereby put an end to the tenancy before the tenant enforced his right. The question came before the Court of Common Pleas in Ireland in 1857, in Deeble v. McMullen, 8 Ir. C. L. R. 355, where the court took time to consider, and where very lucid and learned judgments were delivered by Monaghan, C. J., Ball and Keogh, JJ. The judgment of Monaghan, C. J., is a very elaborate and exhaustive examination of the authorities, and the chief justice does not attempt to conceal his entire disapproval of Penton v. Robart

and he there lays down the principle, which we submit is the correct one, that "a tenant who remains in possession after the determination of his tenancy, by the service and expiration of a regular notice to quit, without any *bona fide* right so to do · · · cannot, by such, his tortious and illegal overholding, acquire a right as against his landlord to remove fixtures which, in my opinion, on the determination of the tenancy, became the property of the landlord, being then affixed to and part of the freehold, which then became his property."

This case of Deeble v. McMullen, is in complete conflict with Penton v. Robart, and Charles, J., in deciding Barff v. Probyn, having to choose between Penton v. Robart, on the one hand, and the general course of the authorities from the earliest times downward on the other hand, has chosen to follow these authorities and to hold that, when a tenancy has come to an end and when the tenant, although in possession, is in possession under such circumstances that he is no longer entitled to consider himself as tenant, he has no longer a right to remove fixtures which then become the property of the landlord.—*Solicitor's Journal.*

RIGHTS OF INFANTS TO AVOID CONTRACTS.

The rule seems to be pretty well settled that an infant's right to avoid a contract made by him is not impaired by the fact that he has made false representations as to his age at the time of entering into the agreement. This doctrine has been recently reaffirmed in the late case of Alt v. Groff (Minn.), 68 N. W. Rep. 9. There has been a good deal of interesting discussion on the question of the effect of fraudulent misrepresentations as to age made by minors, and the decisions are not altogether harmonious.

On this question of estoppel the decisions hold that the very fact of entering into a contract is an implied representation that the infant has power to do so, and it cannot be strengthened by an explicit statement of that which is implied from the very act itself. Thus in Sims v. Everhardt, 102 U. S. 300, the court used the following language:

"A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in the deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed."

But above and beyond this rule, based on technical reasons, the policy of the law, which is at the foundation of all these decisions on the subject of infancy, forbids an exception in case the infant makes a false representation as to age. As said in Conrad v. Lane (Minn.), 4 N. W. Rep. 695:

"To make an exception to the rule in cases in which the infant has at the time of making an alleged contract represented himself to be of age, would be a manifest infringement upon the policy of the law—a disregard of the reasons upon which it is founded, and of the purpose which it has in view, viz.: To protect the infant from being drawn into contracts which it is not necessary for him to make, and of which he is not capable of judging."

And in this connection, we cannot refrain from citing the language in Conroe v. Birdsall, 1 Johns. Cas. 127, 1 Am. Dec. 105, as follows:

"Attempts to shake principals which have been sanctioned by the practice of ages, ought to be well considered before they receive the countenance of a court of justice. If an allegation like the present were ever permitted to destroy an infant's right of avoiding contracts, not one in a hundred of his contracts would be placed in his power to avoid, for nothing would be easier than to prevail upon the infant to make a declaration which might be shown as evidence of deliberate imposition on his part, though prompted solely by the person intended to be benefited by it."

The following cases all adhere firmly to the rule that misrepresentations as to age do not estop a minor to plead his infancy: Burdett v. Williams, 30 Fed. Rep. 697; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678; Wieland v. Kobick, 110 Ill. 16; McKamy v. Cooper (Ga.), 8 S. E. Rep. 312; Meniom v. Cunningham, 11 Cush. 410.

It is settled beyond cavil that a mere failure by an infant to disclose his age is not a misrepresentation. Baker v. Stone, 136 Mass. 405; Thormaehler v. Kaeppel (Wis.), 56 N. W. Rep. 1089.

Courts of equity which draw their principles more from substance than form, are privileged to occasionally set aside rules of law which operate harshly, and they will, in cases where gross fraud has been practiced, compel an infant to abide by a contract which he has induced another to enter into the belief that he was of full age. This is, however, an extraordinary doctrine, and only to be enforced where it is clearly necessary to prevent the perpetration of a fraud. Evans v. Morgan (Miss.), 12 South. Rep. 270; Charles v. Haftedt (N. J.), 26 Atl. Rep. 564.

The question of whether an action of deceit can be maintained against an infant who fraudulently represents himself to be of full age, is a mooted one. It has been decided both ways. The Supreme Court of Indiana has decided that it can in Rice v. Boyer, 9 N. E. Rep. 420. The court says:

"Our judgment, however, is that where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequences would be an indirect enforcement of his contract; for the recovery is not upon the contract, as that is treated as of no effect, nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached, and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his liability for it concedes this, but affirms that he must answer for his positive fraud."

On the other hand, the Supreme Court of Vermont, in Nah v. Jewett, 18 Atl. Rep. 47, has reached exactly the opposite conclusion, and states its reasons as follows:

"While it is true as a general proposition of law, that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*. A reference to the declaration in the case shows that the representations made by the defendant as to his age, using the concise languge of Chief Justice Pierpoint in Doran v. Smith, 49 Vt. 353, 'enter into and constitute an element of the contract itself; it is that that make them actionable. The contract must be alleged and proved or there can be no recovery. The contract is the basis of the action. The fraud is predicated upon the contract.'"

There is a *dictum* in Davidson v. Young, 38 Ill. 145, to the effect that:

"Undoubtedly an infant is responsible in damages for his torts and frauds. If he were to falsely allege himself to be of age, for the purpose of inducing another person to purchase and take a deed of lands, he would be liable to respond in damages for any injury which might result to the purchaser in consequence of the deceit."

This, however, cannot be said to be anything more than a *dictum*.

It is settled that in case of a misrepresentation, the defrauded party can rescind the contract and recover back the goods. Badger v. Phinney, 15 Mass. 329; Neff v. Landis (Pa.), 1 Atl. Rep. 177; Kitchen v. Lee, 1 Paige, 107.

Just what the true rule is as to the right to maintain an action of deceit for fraudulent representations as to age, it is difficult to say, in view of the decisions. On the one hand, it can be urged that there was a material misrepresentation which induced the party to do something which he would not otherwise, and which has resulted in injury to him. On the other, it is to be remembered that the wise policy of the law has thrown around infants an immunity from contracts which they may enter into. It is a disability which they cannot remove. No declaration of theirs can give vitality to a contract. Whatever rights are sought to be enforced against them grow out of the contract. In the ordinary action of *assumpsit*, the infant is sued because he did not keep his contract. In the action of deceit, he is sued because he made a false representation which induced the plaintiff to make a contract with him. He exercised his legal right to break that contract, and because of that fact, the plaintiff is injured. Whatever damages have been suffered flow from this breach of contract—the exercise of a legal right. If there had been no breach there would have been no damages. It is but a roundabout way of reaching the same conclusion. When it is considered that the policy of the law, for the protection of the infant, forbids a recovery either on the ground of contract or estoppel, it seems somewhat anomalous that that same policy of protection should allow an action in *ex delicto*, when a judgment in that form is followed by so much more serious consequences.—*National Corporation Reporter.*

THE SERVANT OF ONE MASTER AS THE SPECIAL SERVANT OF ANOTHER.

The CENTRAL LAW JOURNAL for October 26, 1894 (vol. 39, p. 341), contained an interesting article under the above title, by Mr. L. S. Metcalfe, Jr., in which many decisions by various courts are collated and analyzed. When the servants of one master are temporarily, so to speak, farmed out to another, cases difficult of practical solution under the peculiar facts involved sometimes arise though the principle of law determining and governing the suspension of the old and the formation of the new relation is simple and well settled. Where the *status* of servant *pro hac vice* has been established, the temporary master steps into the shoes of the general master, and as far as the particular service is concerned, both as regards legal obligations to the servant himself and responsibility to third persons for his acts. The determinative circumstance as to the creation of the new relation is whether a mutual intention actually existed among the parties, as to the transfer of allegiance. Mr. Metcalfe cites as one of the important cases bearing on the subject, Wylie v. Palmer, 137 N. Y. 248, in which the original or general master was held not liable for a wrongful or negligent act of a servant resulting in personal injury.

"A local committee of a city by letter requested the defendants, manufacturers of fireworks, to send it their catalogue and 'mark out a display for the Fourth of July' to cost a stated sum. Defendants did as requested, adding that 'we inclose printed sheet giving full instructions for firing the display. The committee, in reply, ordered the fireworks, and stated that 'we would like to have a man take charge of the display.' Defendants answered that 'we understand that we have your positive order for display to cost $400.00 net.' Under such contract the defendant shipped the fireworks ordered to such committee, and sent a man and a boy to aid it in discharging them. The committee had entire control of the display, and the man and boy acted under its directions. While such man was arranging the set pieces, the chairman of the committee ordered an associate and the boy to discharge rockets, one of which was fired horizontally by the boy and injured plaintiff. It was held that the boy was the committee's servant, and defendants were not liable. The court used this language: 'If the display was that of the committee, as I think it was, then both the man and the boy, though in the general employment of the defendants, were nevertheless servants of the committee, and, for the time being, under its direction and control."

In Morgan v. Smith, 35 N. E. Rep. 101, the Supreme Court of Massachusetts remarked: "There is no doubt that the general servant of one person may become the servant of another by submitting himself to the control and direction of the other. In such a case the servant becomes the fellow-servant of the servants of the person under whose control he comes; and neither his general master nor his special master is liable if he is injured by the negligence of one of the other servants."

In Johnson v. Lindsay, L. R., App. Cas., 371, Lord Watson used this language: "I can well conceive that the general servant of A might, by working towards a common end along with the servants of B, and submitting himself to the control and orders of B, become *pro hac vice* B's servant, in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned by his fault to B's common workmen. In order to produce that result the circumstances must, in my opinion, be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purpose of the common employment."

The subject has something of a timely interest because of two recent decisions. Delaware, etc. Ry. Co. (N. J.), 34 Atl. Rep. 986; Missouri, etc., Ry. Co. v. Ferch (Tex.), 36 S. W. Rep. 487. Each of these actions was brought by a servant for damages or personal injuries, and in both of them the necessity of showing knowledge of and consent by the servant to the alleged new and special relation of master and servant is emphasized. In the New Jersey case a railroad corporation endeavored to escape liability for the negligent act of its servant on the ground that the plaintiff, although primarily the servant of a rolling mill company, had become the servant *pro hac vice* of the railroad company, and therefore, the fellow-servant of the employee causing the injury. It was held that no prejudicial error had been committed in submitting to the jury the question whether plaintiff, at the time, was in the employ of the railroad company, the court, indeed, strongly intimating that, under the

evidence, a positive instruction in plaintiff's favor on this point might have properly been given.

In the Texas case, the plaintiff, who was primarily the servant of the defendant, a railway corporation, had been injured through alleged defective apparatus originally supplied by defendant, and it was held that error prejudicial to defendant had been committed in not submitting to the jury the question whether the service of plaintiff, with his knowledge and consent, and the control of the apparatus, had or had not been transferred to a construction company, being an independent contractor for the defendant. The following extract from the opinion discusses the test as to a transfer of service, as well as states the position of the court upon the conflicting evidence at the trial.

"A railway company is not liable for the negligence of its independent contractor engaged in doing work on its road. Burton v. Railway Co., 61 Tex. 535; Cunningham v. Railroad Co., 51 Tex. 509. If the facts stated above are taken as true, it would appear that plaintiff, and the crew he was with, knowingly went from the service of the appellant into the service of the construction company, and for the term of his service there, became removed from the service, control and orders of appellant, and was subject to the construction company alone. In this view of the case, appellant would not have been their master, while they were so engaged, so as to owe them the well-known duty in regard to providing safe machinery and keeping the same in repair. On the other hand, there was testimony going to show that plaintiff was not aware of the existence of said construction company, and was not informed that they were going to work for such company; that this crew and machine would go where ordered by the officers of appellant, sometimes to work on the roads, but always remaining in the employ of appellant; that he went with the machine crew and foreman to this work under orders of appellant's engineer; that when the work was completed they were ordered back by appellant. In brief, there was evidence that would sustain a finding that plaintiff did not know of or assent to any change of masters, but in doing this work was performing the customary service for which he was engaged by appellant without any act of his own, or any circumstances, to indicate to him that he was serving any other person. While it cannot be doubted that if the machine and crew went into the independent service of the contractor, and subject to its sole direction and control, with knowledge on the part of the crew of the change, appellant could be absolved from the duties that apply to the relation of master, still we think it equally clear that the employer cannot relegate his employee to the service of another, under circumstances that do not charge the employee with notice of any change, and thereby escape the obligation of master. The servant cannot be held to have ceased being such where he is continued in his ordinary work, and no knowledge is imparted to him of any change in the relations between him and his employer, See Ward v. Fiber Co. (Mass.), 28 N. E. Rep. 300; Morgan v. Smith (Mass.), 35 N. E. Rep. 101, citing Johnson v. Lindsay (1891), App. Cas. 371; Railway Co. v. Dorey, 66 Tex. 152, 18 S. W. Rep. 444. According to the rule just mentioned, the original employer continues to sustain the relation of master, and (without any reference to the question of his liability to third persons, and without reference to the contractor's liability), in our opinion it follows that the servant may look to him for the performance of those duties that result from the relation of master, among which was reasonable care in keeping safe the machinery at which he worked. The court erred in holding that the evidence conclusively showed that plaintiff was appellant's servant when injured, and in withdrawing that question from the jury."—*New York Law Journal.*

TRADES UNIONS—MALICIOUSLY INDUCING THIRD PERSONS TO BREAK THEIR CONTRACTS.

While one trade union case is waiting judgment in the House of Lords, another was recently decided in Chancery. In the former case, Allen v. Flood, a firm of ship-builders employed two shipwrights to repair the wood work of a ship, and iron-workers to repair its iron work. The iron-workers were members of a trade union, and objected to working in the same yard with the wood-workers, because the latter had previously worked at iron work on other ships in another yard. The district delegate of the union was called in by the iron-workers, and he informed the employers that the iron-workers would leave off work, unless the two wood-workers were discharged that day. In consequence of that threat they were discharged at the end of the day. What the iron-workers objected to was the perfectly legal act of the wood-workers in having on some former occasion done iron work, which the iron-workers were pleased to think a kind of poaching on their preserves; and, on the other hand, what the employers were induced to do was not to break any contract with the wood-workers, but to pay them off at the end of their day's work, they being employed by the day. The wood-workers brought an action against the district delegate, and the chairman and secretary of the union, for maliciously and with intent to injure them inducing the employers to discharge them, and refuse to engage them again. The jury found that the district delegate had acted maliciously, and that the wood-workers had been thereby injured, and assessed the damages at £20 to each; but that the chairman and secretary of the union had not authorized the delegate's acts. The validity of the verdict depended on whether the delegate's act was malicious. Knowing that they could not afford to let the iron-workers go, he put that screw on to induce the employers to pay off the wood-workers and thereby injure them. The court held it to be clear that merely to persuade a person to break his contract gives no cause of action; and similarly that one has a perfect right to advise or persuade another not to make a contract. But they further held that if, in either case, this was done maliciously for the purpose of injuring the person to whom the advice is given, or some one else, the person against whom the malice is directed and carried out has a cause of action, not on the ground of persuasion, but on the ground of the malice directed against him. Accordingly it was held, in conformity with prior decisions, that if one uses persuasions for the indirect purpose of injuring another, or of benefiting himself at the expense of that other, "it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it." Per Lord Justice Brett, now Lord Esher, in Bowen v. Hall (1881), 6 Q. B. D. 333. This admittedly involves the result that what may be lawfully done to the injury of another, if done without malice, becomes unlawful if done with malice, and gives a right of action if injury ensues. Applying this to the case in hand, the trade union delegate threatened injury to the employer's business, his motive being to punish the wood-workers for what they had previously and quite lawfully done, and to interfere with their liberty of earning their livelihood in future, a motive

which the court held that the jury had rightly characterized as malicious. This judgment lately afforded material enough for keen discussion in the House of Lords, raising the question, on the one hand, whether trade unions have any right to interfere, by intimidating employers, with the right of non-union men to earn their livelihood; and on the other hand, the difficulty of holding that the acts of interference which are not themselves unlawful become so by the motive which prompts them. Is that a question of morals or also of law? and, besides, is the motive malicious when the acts are done, as here, from no animosity to any individual, but from self-interest, and for the greater good, as the unions believe, of the workmen generally? These are some of the questions which the House of Lords will require to deal with.

The other case, Lyons v. Wilkins, decided in Chancery by Lords Justices Lindley, Kay, and Smith, and reported last month (1896), 1 Ch. 811, raises two questions, one resembling that already referred to, the other touching the statutory offense of picketing. Messrs. Lyons were manufacturers of leather goods, and the officials of the union of workers in that trade desired them to raise the wages and alter their system of employment. As this was refused, the union picketed their works in the manner after mentioned, and also endeavored to get one Schoenthal, a sub-manufacturer who made goods for Messrs. Lyons, to cease to work for them, and failing in this ordered a strike of his workers. There was no complaint of the wages Schoenthal gave nor of his system of working, and the object of ordering a strike of his workers was to hit Messrs. Lyons through him. The object was to injure Messrs. Lyons and their trade, if they would not give in to the demands of the union; and the court held that here also there was evidence of malice. But there in the ship case the malice was directed against the two woodworkers—the obnoxious employees—while here it was directed against Lyons, the obnoxious employers. Similar considerations, however, apply in both cases, and it would have been well if both cases had been under review in the House of Lords at once. Another difference is the remedy sought and obtained. In the later case an injunction or interdict was granted, restraining the union from preventing Schoenthal working for Lyons by withdrawing his workmen from their employment.

The other part of this case, picketing, rests on the express though somewhat limited words of the statute of 1875, which, however, were found strong enough to support an injunction. The act provides that every person who, with a view to compel another to do or abstain from doing any lawful act, watches or besets the house or premises where he resides, works, or happens to be, or the approaches thereto, may be convicted, and fined or imprisoned; but it is added, that attending such places, that is, the premises or approaches, "in order merely to obtain or communicate information," is not to be held illegal. Here, however, more than information was in view, for the pickets accosted workers, entering and leaving the premises, tried to persuade them not to work, and distributed cards containing that request. But for the statute all this, which did not go beyond persuasion, would have been quite legal, and indeed would still be legal if carried on at a distance from the premises and their approaches. Worked, however, as the picket was, it clearly came within the penalties of the statute; and malice did not require to be established; it is enough if the act is done contrary to the statute. A further important point was ruled—viz., that though the act says nothing about it, the civil remedy of interdict may be granted against picketing. This is valuable, because prevention is generally better than cure, and penalties do not go to the aggrieved parties but to the public exchequer; besides damages cannot always be recovered from such wrong-doers.—*J. C. L. in Juridical Review (Edinburgh).*

CORRESPONDENCE.

MORTGAGED PROPERTY IN CASE OF DAMAGE SUITS.

To the Editor of the Central Law Journal:

A made a chattel mortgage to B, which covered property sufficient in value, to many times pay the debt, secured. After default in the payment of said debt, and while all the property was in the possession of the mortgagor, one piece of the property was destroyed by a railroad company. The mortgagee brought action against the company for damages for destroying the property, to satisfy his debt. Was he the real party in interest before reducing the mortgaged property to possession? Should he have not exhausted the other property before bringing action against the company? H.

ILLEGAL SALE OF LAND.

To the Editor of the Central Law Journal:

Farmer owning land by grant from the State by will devised only life interest to his widow. She sold said land and also by will devised it to the purchaser. Query: Suppose the legal heir of farmer brought suit against present presumed owner, would the courts cancel those two illegal instruments or deal with them as if they were not fraudulent, *i. e.*, would long lapse of years and statute of limitations be a bar to any action? A. W.

FALSE REPRESENTATIONS.

To the Editor of the Central Law Journal:

In the last number of the JOURNAL appears a note appended to the case of Swift v. Rounds decided by the Supreme Court of Rhode Island, reported on page 266 of the JOURNAL. At page 268, right hand column, the second paragraph of the note begins with the following statement: "The law of false representations received a very considerable extension in England from the decision of Ward v. Hobbs, Law Reports, 2 Q. B. D. 331," and the case is then set out somewhat *in extenso*. The "considerable extension" made by this case did not remain extended for any considerable time, for the judgment was promptly reversed by the court of appeal in 3 Q. B. D. 150, and the judgment of reversal was affirmed by the House of Lords in 4 Appeal Cases, 13. It is misleading to persons not familiar with the subject, to find cited as a leading case, a decision long since overruled and condemned by the highest tribunal of England.

G. W. W.

BOOKS RECEIVED.

Handbook on the Law of Real Property. By Earl P. Hopkins, A. B., LL. M. Author of Problems and Quiz on Criminal Law, Contracts, Criminal Procedure, Constitutional Law, etc. St. Paul, Minn. West Publishing Co., 1896.

Studies in the Civil Law, and its Relation to the Law of England and America. By William Wirt Howe, of the Bar of New Orleans; Sometime a Justice of the Supreme Court of Louisiana, and W. L. Storrs, Professor of Municipal Law in Yale University for the year 1894. Boston: Little, Brown and Company, 1896.

Commentaries on American Law. By James Kent. Vols. I-IV, Twelfth Edition, Edited by O. W. Holmes, Jr. Fourteenth Edition. Edited by John M. Gould, Ph.D., Author of the "Law of Waters," Joint Author of Gould and Tucker's "Notes of the U. S. Revised Statutes," etc. Boston: Little, Brown & Company. 1896.

A Digest of the Decisions of the Courts of Last Resort of the Several States, from the Year 1892 to the Year 1896. Contained in the American State Reports, Volumes 25 to 48 Inclusive, and of the Notes Therein Contained, to which is Prefixed an Alphabetical Index to the Notes. By W. S. Church. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1896.

Handbook on the Law of Torts. By William B. Hale, LL.B. Author of "Bailments and Carriers," "Damages," etc. St. Paul, Minn.: West Publishing Co. 1896.

The Law of Passenger and Freight Elevators. By James Avery Webb, of the St. Louis and Memphis Bars. Editor of the last editions of Burrill on Assignments, Pollock on Torts, and Smith on Negligence. St. Louis. The F. H. Thomas Law Book Co., 1896.

HUMORS OF THE LAW.

A coroner's jury in Maine reported that "deceased came to his death by excessive drinking, producing apoplexy in the minds of the jury.

"We propose to show, gentlemen of the jury," said counsel for the defense, "that it is impossible for the defendant to have committed this crime.

"In the first place, we will prove that the defendant was nowhere near the scene of the crime at the time the crime was committed.

"Next, we will offer the indisputable testimony of persons who saw the defendant upon the spot, and who did not see the defendant commit the crime.

"We will show that no poison was found in the body of the deceased.

"Not only that, but we will prove that it was put there by the prosecution in this case.

"We will, furthermore, show that the deceased committed suicide.

"And last, but not least, we will prove, beyond the shadow of a doubt, that the deceased is not dead.

"In view of all which corroborative facts, gentlemen of the jury, we respectfully ask for an acquittal."—*Journal, New York.*

"Sir," said the judge to the young man, "you know the game of poker?"

"If to know that you know nothing is the beginning of wisdom, then have I set my foot upon the border land of the knowledge of poker," was the adept's cautious reply.

"Sir," thundered the judge, "you know what constitutes two pairs and threes, you know a jackpot and a flush, you know a full house, and you have seen a dog and four bullets. Don't deny it, sir."

"I will not deny that I am acquainted with these mysteries," replied the adept.

"Then, sir," cried the judge, triumphantly, "tell me, upon your oath, will threes beat two pairs? Answer, sir."

"Judge," answered the adept, "you are too hard for me, but in my humble opinion it depends upon the fellow holding the two pairs."

Only Son—I don't believe I'll ever amount to much as a lawyer, father.

Father—Keep right on climbing the ladder, rung by rung, my son, and you'll get to the top.

Only Son—That advice is all right, father, but the trouble is there are so many young fellows in the profession that I can't get within a mile of the ladder.

The society young man was under discussion.

"I don't believe he knows what work is," said the doctor.

"Oh, yes, he does," replied the lawyer.

"I mean real hard work. Did you ever see him at anything in that line?

"Why, of course. I've seen him play golf."

"How's your son, the lawyer, getting on?"

"Badly, poor fellow. He is in prison."

"Indeed!"

"Yes; he was retained by a burglar to defend him, and he made so good a plea in the burglar's behalf that the judge held him as an accessory."—*Buffalo Sunday Times.*

An eccentric lawyer thus questioned a client: "So your uncle, Dennis O'Flaherty, had no family?" "None at all, Your Honor," responded the client. The lawyer made a memorandum of the reply, and thus continued: "Very good. And your father, Patrick O'Flaherty, did he have chick or child?"

The Lawyer—I am sorry that I cannot take your case against your manager, but I have been retained by the other side.

The Actress—Oh, well, it dosen't matter. So long as you are in the case we will be sure to have good press notices.—*Up to Date.*

Young Lightpayte—How long does a man have to study if he wants to be a good lawyer?

Lawyer Sharpe—Why do you ask that question?

"Because I am thinking of studying law myself."

"Five hundred years."

Lawyer—So Mrs. Youngwild refused utterly to pay that bill?

Clerk—Yes. When I told her that we would have to press her for the payment of it, she just said: "Bring on your pressure."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNT—Splitting Causes.—Where one sold to another, on credit, two bills of merchandise on different days, in two consecutive months of the same year, the presumption, in the absence of any proof to the contrary, was that the demand arising upon the two sales constituted one entire and indivisible account in favor of the seller against the purchaser; and, this being so, the former could not divide the same into two separate accounts, predicated, respectively, upon the two sales, so as to bring actions thereon within the jurisdiction of a justice's court.—PARKS v. OSKAMP, Ga., 25 S. E. Rep. 869.

2. APPEAL—Law of the Case.—The principle of the law of the case on a second trial does not apply to determinations of fact on conflicting competent evidence, especially where there is additional, though cumulative, evidence.—WALLACE v. SISSON, Cal., 45 Pac. Rep. 1000.

3. ATTACHMENT—Bona Fide Purchaser.—The lien of a creditor acquired by attachment of real estate, the title to which is in his debtor, although the attachment is made without notice that his debtor has conveyed it to a *bona fide* purchaser, is defeated by actual notice of such conveyance, received before he levies his execution thereon, or has lawfully applied it to the satisfaction of his debt.—REYNOLDS v. HASKINS, Vt., 35 Atl. Rep. 349.

4. ATTORNEY—Reinstating Disbarred Attorney.—Disbarment of an attorney does not preclude his reinstatement on good cause shown.—IN RE TREADWELL, Cal., 45 Pac. Rep. 993.

5. BASTARDY—Res Judicata.—In bastardy proceedings, a dilatory plea, setting up the failure to file a recognizance, merely alleging that "no proper recognizance" was filed, without setting it out, is insufficient. A judgment in bastardy proceedings in favor of defendant, on the ground that the court was without jurisdiction, is not a bar to a subsequent prosecution.—LYNN v. STATE, Md., 35 Atl. Rep. 21.

6. CARRIERS OF PASSENGERS—Failure to Keep Open Ticket Office.—When a railroad company fails to keep its ticket office open as required by paragraph 1825 of the General Statutes of 1889, it cannot demand, charge, or receive from a passenger more than the regular fare of three cents per mile, and the company or its employees have no right to expel him from the train for refusing to pay more.—ATCHISON, T. & S. F. R. CO. v. DICKERSON, Kan., 45 Pac. Rep. 975.

7. CERTIORARI—Estoppel.—Where the common council acts in good faith for the benefit of the public in the vacation of a street, *certiorari* will not lie at the instance of a member of the traveling public to review such proceedings, where such member, being aware of such proceedings, and that large expenditures were being made by a railroad company in furtherance of the change, fails to invoke the aid of any court to restrain such action.—BAUDISTEL v. RECORDER AND COMMON COUNCIL OF CITY OF JACKSON, Mich., 68 N. W. Rep. 292.

8. CONDITIONAL SALE—Recording Contract.—A contract by which chattels are sold with provision that title remain in the seller till payment of the purchase money is not within Act 1889, requiring "all chattel mortgages or other instruments of writing having the effect of a mortgage or a lien on personal property" to be recorded; and the seller can therefore claim as against an attaching creditor of the buyer, though he instrument be not recorded.—MAXWELL v. TUFTS, N. Mex., 45 Pac. Rep. 979.

9. CONSTITUTIONAL LAW—Equality of Rights.—Section 2, art. 4, of the constitution of the United States, places citizens of each State upon the same footingwith citizens of other States so far as the advantages resulting from citizenship in those States are concerned, and inhibits discriminating legislation against them by other States. It insures to citizens of one State the same freedom possessed by citizens in other States in the acquisition and enjoyment of property and pursuit of happiness, and guaranties to them in other States the equal protection of their laws. The privileges and immunities thus secured to citizens of each State in the several States are those which are common to the citizens in other States under their constitution and laws by virtue of their *status* as citizens.—STATE v. BOARD OF INSURANCE COM'RS OF FLORIDA, Fla., 19 South. Rep. 772.

10. CONTRACT—Conditions Precedent—Performance.—By the express terms of the contract in this case, the performance of each stipulation on the part of the plaintiff below is a condition precedent to the continuing obligation of the contract. Where a written agreement, by its terms requires a daily and continuous performance of the conditions by one party, and, when he performs the conditions, he is entitled to the compensation at the end of each month, as specified in the agreement, the refusal or neglect on his part to perform each condition of the contract day by day, continuously produces a breach of the conditions of the agreement, and the other party is relieved from the performance of the agreement on its part, and may refuse to thereafter continue the contract.—CITY OF OSAWATOMIE v. MILLS, Kan., 45 Pac. Rep. 937.

11. COVENANTS OF SEISIN—Breach.—L. Bolinger and Rosa Bolinger conveyed, by deed with full covenants of seisin, four lots in block 40, and all of block 39, in the town of Mapletown, to L. A. Brake, for the consideration of $1,100. At the time of the execution and delivery of the deed, the Bolingers were only seised of an undivided five-ninths of the four lots in block 40, and of an undivided four-ninths of block 39: Held, that the covenants of seisin were broken as soon as the deed was made.—BOLINGER v. BRAKE, Kan., 45 Pac. Rep. 950.

12. CRIMINAL EVIDENCE—Bigamy—Marriage.—While a presumptive marriage, based on cohabitation and repute, cannot be established to defeat a subsequent marriage in fact, yet cohabitation and reputed marriage are facts receivable in the proof of a marriage in fact, and a man charged with bigamy is entitled to show that the woman to whom he was first married had previously claimed, and was reputed, to be married to another man, with whom she lived and cohabited for a number of years, and who was still living at the time of her marriage to defendant, as evidence in support of his claim that his first marriage was void.—STATE v. SHERWOOD, Vt., 35 Atl. Rep. 352.

13. CRIMINAL LAW—Homicide — Evidence in Mitigation.—Evidence of intoxication of defendant at the time of the murder is inadmissible in mitigation of the penalty; he having pleaded guilty, and it appearing from his confession and other testimony that the crime was deliberate and premeditated, and in accomplishment of a pre-existing plot, and that he at the time knew, and afterwards confessed in detail, the part he took in it.—PEOPLE v. MILLER, Cal., 45 Pac. Rep. 98.

14. CRIMINAL LAW—Homicide—Self-defense.—An instruction that "no man by his own lawless acts can create a necessity for acting in self-defense, and thereupon, killing the person with whom he seeks the difficulty, interpose the plea of self-defense. The plea of necessity is a shield for those only who are without fault in occasioning it and acting under it," is not erroneous, when immediately followed by the statement: "Undoubtedly the defendant can show in justification that, although he brought upon himself an imminent danger, he, in the presence of that necessity,

changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow. But in the absence of such circumstances, when the defendant seeks and brings upon himself a difficulty with the deceased, in which he willingly continues until he involves himself in the necessity to kill, the law will not hold him guiltless. The right of self-defense which justifies a homicide does not include the right of attack."—PEOPLE v. KENNETT, Cal., 45 Pac. Rep. 994.

15. CRIMINAL LAW — Larceny — Indictment.—Under section 2449, Rev. St., the penalty thereby prescribed follows the larceny of any of the domestic animals therein named, regardless of their value. In such cases, where the grade of the offense, or the penalty prescribed therefor, is not measured by or dependent upon the value of the property stolen, but is determined entirely by the class or species of such property, it is not necessary in an indictment charging its larceny, to allege any value; neither is it necessary to prove any value.—MIZELL v. STATE, Fla., 20 South. Rep. 769.

16. DESCENT AND DISTRIBUTION—Wife's Personalty.—Gen. St. 1866, p. 303, § 19, provides that the personalty of a married woman shall vest in the husband, in trust for the wife, and on the death of the husband shall vest in the wife if living, or, if she has deceased, in her devisees, legatees, or heirs at law, in the same manner as if she had always been a *feme sole*. Gen. St. § 2792, vests the property in the husband in trust, and provides that upon his decease the remainder of such trust property shall vest in the wife, if living; otherwise as the wife, by will, may direct, or, in default of a will, in those entitled by law to her intestate estate: Held that, if the wife has deceased intestate, her personalty, on the subsequent death of her husband, vests in her administrator, who is entitled to the possession thereof.—CONNECTICUT TRUST AND SAFE DEPOSIT CO. v. SECURITY CO., Conn., 35 Atl. Rep. 342.

17. DOWER—Rights of Widow.—The widow, left in possession of land at the death of the husband, prior to the assignment of dower has no standing, by virtue of her dower right, to attack a decree rendered against the husband for possession of the land, on the ground that it was rendered after the death of the husband without revivor.—SMITH v. WHITSETT, Tenn., 36 S. W. Rep. 1048.

18. ESTATES—Liability of Life Tenant.—Where there is an estate for life, and a remainder in fee, and there exists an incumbrance, binding the whole estate on the land, and no special equity exists between the life tenant and the remainder-men, the former is bound to pay the interest accruing upon the incumbrance during the continuance of his estate.—IVORY v. KLEIN, N. J., 35 Atl. Rep. 346.

19. EVIDENCE—Admissions of Agent.—In an action to recover an organ, under a chattel mortgage to secure the price, defendant testified that plaintiffs' agent, who held the notes for collection, had testified on a former trial that an order previously given him by defendant's father had been accepted by him in full payment of the notes: Held inadmissible, it being the admission of an agent after the act.—ESTEY v. BIRNBAUM, S. Dak., 68 N. W. Rep. 290.

20. EVIDENCE — Municipal Corporations — Defective Sidewalks.—In an action for personal injuries, where plaintiff had testified on cross-examination that after she was injured she went to her usual work at a factory, and did not find out for several days that her knee was fractured, it was error to permit her to state, as a reason for going to work so soon, that she had to meet the expenses of her mother's funeral, and was in debt, thereby bringing her poverty to the attention of the jury.—BURLESON v. VILLAGE OF READING, Mich., 68 N. W. Rep. 294.

21. FRAUDS, STATUTE OF—Specific Performance.—The statute of frauds is not satisfied in a case of specific performance by a letter that has been lost, where its contents are testified to by the receiver, and the letter does not contain a description of the land in dispute with reasonable certainty.—DARKE v. SMITH, Utah, 45 Pac. Rep. 1006.

22. GUARANTY—Construction — Discharge.—Plaintiffs agreed to extend a line of credit to a watch company, of a certain amount, for a certain time, on condition that defendants go their security for that amount, with provision that the line of credit be reduced a certain amount each year by quarterly payments, to be distributed on notes as they fell due; agreed "to accept a note or notes of said company in payment of our statement rendered about the first of each month;" and agreed to renew and extend any or all notes that might fall due, provided the money owed by the company did not exceed the line of credit, or the amount to which it had then been reduced. Defendants' guaranty recited: "Having carefully read above contract, we guaranty to protect any bill the company may buy:" Held, that the guarantors' undertaking was that the bills should be actually paid, and their liability did not end with the mere giving of notes by the company, and was not necessarily discharged by a change of notes, either by renewal or extension of the company's notes, or by acceptance of notes of other makers.—ROBBINS v. ROBINSON, Penn., 35 Atl. Rep. 337.

23. GUARANTY—Construction—Liability of Guarantor.—Where there is evidence tending to prove the material facts necessary to entitle the plaintiff to recover, it is error for the court to sustain a demurrer to the evidence, and discharge the jury, and render judgment for costs against the plaintiff.—DAVIS SEWING-MACH. CO. v. GIBBONS, Kan., 45 Pac. Rep. 946.

24. INSURANCE — Against Liability for Damages.—A policy promising to pay all damages with which the insured may be legally charged, or required to pay, or for which it may be legally liable, is not a contract of indemnity alone, but also a contract to pay liabilities; and a discharge of such liabilities by the insured is not a necessary condition precedent to its recovery thereon, the measure of recovery being the amount of the accrued liability.—AMERICAN EMPLOYERS' LIABILITY INS. CO. v. FORDYCE, Ark., 36 S. W. Rep. 1051.

25. INTEREST—Contract—Compound Interest.—A contract for interest at 10 per cent. per annum, provided the note is paid at maturity, but, if not then paid, interest to be paid at 12 per cent. from date of note, is a proper contract for interest, the increase not being a penalty.—FINGER v. MCCAUGHEY, Cal., 45 Pac. Rep. 1004.

26. JUDGMENT—Damages—Accord and Satisfaction.—Where the court has rendered an interlocutory judgment for plaintiff, and referred the assessment of damages to the clerk, the parties are limited to such assessment, and defendant cannot show accord and satisfaction.—SEAVER v. WILDER, Vt., 35 Atl. Rep. 351.

27. LIFE INSURANCE — Condition—Waiver.—A provision of a policy of life insurance that it should be void in case the insured was not in sound health at the time of its issuance is waived by a collection of premiums thereon after knowledge by an agent of the insurance company, having authority to cancel the policy, that the holder was not in sound health when it was issued, notwithstanding a provision that no waiver could be made except in writing signed by the president and secretary.—HILT v. METROPOLITAN LIFE INS. CO., Mich., 68 N. W. Rep. 300.

28. LIFE INSURANCE—Proof of Death.—A life policy provided that, if any premium was not paid when due, the policy should cease, except as provided in Act Mass. April 10, 1861, "subject to which this contract is made." It also provided that no claim should exist under it unless notice and proof of death were given within two years from death of insured. Act Mass. April 10, 1861, provides that in case of failure to pay premiums the policy shall not be forfeited because thereof, but the net value of the policy at the time of the default shall be treated as a premium to uphold the policy so long as its amount will serve the purpose, "provided, however, that notice of the claim and

proof of death shall be submitted to the company within ninety days after the decease:" Held, that the policy waived the 90-days provision of the statute, and allowed notice and proof of death within 2 years, even where there had been default in payment of premiums.—ELLIS V. MASSACHUSETTS MUT. LIFE INS. CO., Cal., 45 Pac. Rep. 988.

29. MARRIED WOMEN—Contracts — Subscriptions.—A subscription by a married woman to a *bouns* to induce the location of a building in the neighborhood of her separate land, entered into in consideration of the benefits to her land to be derived from such a location of the building, is not binding on her, under How. Ann. St. § 6295, giving a married woman a right to contract, sell, transfer, mortgage, and convey her separate estate.—DETROIT CHAMBER OF COMMERCE V. GOODMAN, Mich., 68 N. W. Rep. 295.

30. MASTER AND SERVANT — Contract of Hiring—Acquiescence in Termination.—Where a servant quit the employment of his master before the expiration of the term for which he had contracted, and the employer, with knowledge of such fact, stated that he would not pay him any more wages until the expiration of the term, such statement is equivalent to a promise to pay at that time, and is a waiver of the breach of the contract by the employee, which entitles him to recover the contract wages for the time he worked.—MERRILL V. FISH, Vt., 35 Atl. Rep. 368.

31. MASTER AND SERVANT—Contributory Negligence.—Where a person seeks employment in any line of business where there is danger, he assumes the risk and hazard ordinarily incident to such employment. By accepting the employment, he represents himself as competent to perform that kind of work, and that he will not be guilty of negligence in and about the performance of the same. He owes to his employer diligence and care in the execution of the undertaking; and, where he had been guilty of negligence contributing to his injury personally, he cannot recover for such injury.—MISSOURI, K. & T. RY. CO. V. YOUNG, Kan., 45 Pac. Rep. 963.

32. MASTER AND SERVANT—Negligence—Electricity.—An electrical railway company, operating its cars by the overhead trolley system, is required to use every reasonable precaution, known to those possessed of the knowledge requisite for the safe treatment of electricity as a motive power, to provide against the danger of injuries to its employees.—MCADAM V. CENTRAL RAILWAY & ELECTRIC CO., Conn., 35 Atl. Rep. 341.

33. MUNICIPAL CORPORATION — Dedication — Acceptance of Street.—While a formal acceptance of a proffered dedication of a street is necessary before the duty is imposed on the public to repair and maintain it, such acceptance is not essential to consummate the dedication, so as to cut off the rights of the owner of the land.—MAYOR, ETC. OF BOROUGH OF BRIGANTINE V. HOLLAND TRUST CO., N. J., 35 Atl. Rep. 344.

34. MUNICIPAL CORPORATION — Ordinance — Removal of Dead Animals.—A city may by ordinance lawfully prescribe that unless the owner of a dead animal, even though the carcass may be of some value, shall remove it, or cause it to be removed, beyond the city limits, within a specified reasonable time, and to a specified reasonable distance, the municipal authorities may deal with such carcass as a nuisance *per se*, and as such take charge of it, and make such disposition thereof as will best conserve the public health.—SCHOEN V. CITY OF ATLANTA, Ga., 25 S. E. Rep. 380.

35. MUNICIPAL CORPORATIONS — Powers—Street Railways.—A municipality has not the authority to grant a street railway company exclusive rights in a street unless such authority is expressly granted by the legislature, or arises by implication so directly as to be equally clear.—DETROIT CITIZENS' ST. RY. CO. V. CITY OF DETROIT, Mich., 68 N. W. Rep. 304.

36. NEGLIGENCE—Defect in Steps to Private House.—Where a board in the platform to the steps leading from a private house broke as one hired to take a trunk from the house was passing over it with the trunk, the owner of the house is not liable for negligence, if he exercised such care in and about keeping the platform in good condition as housekeepers of common prudence are accustomed to exercise; and the platform having been properly constructed, and one which would ordinarily wear many years without repair, and the defect being latent (dry rot on the underside) and unknown to the owner, and no indication being given by the platform that it was unsafe, and the owner not having any knowledge or notice of any deficiency of ventilation under it, he cannot be held negligent for not having examined the platform for any such defect.—BADDELEY V. SHEA, Cal., 45 Pac. Rep. 990.

37. NEGLIGENCE—Electric Railway Companies—Duty to Guard Feed Wire.—Where, in the prosecution of its business, a corporation employs a wire which, because of its being charged with a powerful and dangerous current of electricity, is liable, upon coming in contact with the wires of other corporations, to cause injury or death to employees of the latter while engaged in the performance of their duties, the corporation first referred to is, relatively to such employees, under the duty of observing at least ordinary diligence, not only in preventing such a contact, but also in discovering and preventing its continuance, even when occasioned by the negligence of others, including that of a corporation whose employees are thus exposed to danger.—ATLANTA CONSOL. ST. RY. CO. V. OWINGS, Ga., 25 S. E. Rep. 377.

38. NEGOTIABLE INSTRUMENT — Bill of Exchange—Payment by Check.—A bill of exchange drawn on defendant by C, payable to plaintiff, was presented by plaintiff's agent to defendant. Defendant's manager thereupon called on the agent, and gave its check for the amount, with direction that the draft, which was in the possession of the agent's clerk, then out of the office, should be marked "Paid," and be sent to it. It was so marked and sent that evening: Held, that the giving of the check constituted payment, and not a mere acceptance; so that defendant on learning of the insolvency of C before payment of the check, could not demand the return of the check in exchange for the draft.—EQUITABLE NAT. BANK V. GRIFFIN & SELLEY CO., Cal., 45 Pac. Rep. 985.

39. PARTNERSHIP—Evidence of Dissolution.—A chattel mortgage given on the personalty of a firm, to one who had been a member thereof, by the other members, is admissible in support of the contention of the mortgagee that the firm was dissolved by his selling out to the other members; such mortgage being given to secure payment of the purchase money.—ROWE V. SIMMONS, Cal., 45 Pac. Rep. 983.

40. PLEADING—Limitations—Demurrer.—A complaint resting on the fact that plaintiff was compelled to and did take up and pay notes which he had made for defendant's accommodation is not demurrable on the ground that the action is barred, the complaint not showing when plaintiff made the payments.—PLEASANT V. SAMUELS, Cal., 45 Pac. Rep. 998.

41. RAILROAD COMPANY—Boarding Moving Street Car—Negligence.—For one to attempt to board a street car, the speed of which has merely been slackened in response to his signal that he wished to get on, cannot, in the absence of exceptional circumstances, be declared negligence, as matter of law: and that though the attempt is to get on the front platform, especially where there is a rule of the road that persons smoking should ride thereon, and the person attempting to get on is smoking at the time.—FINKELDEY V. OMNIBUS CABLE CO., Cal., 45 Pac. Rep. 996.

42. REPLEVIN—Dismissal by Plaintiff.—A plaintiff in replevin, having appealed from justice court, cannot, by a dismissal of his appeal, deprive the defendant of his right to a finding of the value of the property and damages, for which he is entitled to judgment on the appeal bond.—STRAUSS V. SMITH, N. Mex., 45 Pac. Rep. 30.